88-1143

No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.
(DOING BUSINESS IN NEW YORK AS NATCORP),
Petitioner,

v.

BANCO DE VIZCAYA, S.A.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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January 11, 1989

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QUESTION PRESENTED

Does a state court dismissal on the ground of *forum non conveniens* of an action brought by an assetless resident of that state deprive the plaintiff of due process of law where the courts of the proposed alternative jurisdiction are unavailable to the plaintiff because it lacks the financial resources to advance the substantial fees and costs required to commence the action in the proposed alternative jurisdiction?

LIST OF PARTIES

Petitioner, National Bank and Trust Co. of North America, Ltd., has no parent companies, subsidiaries, or affiliates.

As of August 18, 1988, Respondent, Banco de Vizcaya, S.A., reported that it has no parent company, but does have the following subsidiaries and affiliates:

Advent International Corp.
Banca Catalana, S.A.
Bancaya Hipotecaria, S.A.
Bancaya Inmobiliaria, S.A.
Banco Comercial de Mayaguez
Banco de Barcelona, S.A.
Banco de Credito Comercial, S.A.
Banco de Credito Y Ahorro, S.A.
Banco de Financiacion Industrial, S.A.
Banco de Credito Canario, S.A.
Banco Industrial de Catuluna, S.A.
Banco Industrial del Mediterraneo, S.A.
Banco Industrial del Sur, S.A.
Banco Meridional, S.A.
Banco Occidental, S.A.
Bancoco
Banquest First Nat'l Bank of Santa Fe
Banquest Nat'l Bank of Albuquerque
Banquest State Bank of Taos
Cedeban, S.A.
Cofiges
Cogebel
Spectra
Financiera Espanola de Inversiones, S.A.
Financiera Grain Via, S.A.
Gral. Financiera de Almacenes Generales de Deposito
Banque de Gestion Financiere, S.A.
Gescaya, S.A.
Gestion de Patrimonios Bancaya
Leasing Bancaya, S.A.

New Mexico Banquest Corp.
New Mexico Banquest Investors Corp.
Plus Ultra, C.A. de Seguros Generales
Sociedad Bancaya de Promocion Empresarial S.A.
Sociedad de Ventas a Credito
Vizcaya Finanz, A.G.
Vizcaya International, N.V.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. As a matter of law, and of due process of law, a court may not dismiss an action on the ground of *forum non conveniens* without first ascertaining that an alternative forum exists both as a legal and as a practical matter	7
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Board of Regents v. Roth, 408 U.S. 564 (1972)	9
Boddie v. Connecticut, 401 U.S. 371 (1971)	9
Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945)	9
Farfanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910 (S.D.N.Y. 1977), *aff'd* 588 F.2d 880 (2d Cir. 1978)	7
Grannis v. Ordean, 234 U.S. 385 (1914)	9
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	7, 10
Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909)	9, 10
Irish Nat'l. Ins. Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90 (2d Cir. 1984)	14
Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985)	8
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	9
Manu Int'l, S.A. v. Avon Products, Inc., 641 F.2d 62 (2d Cir. 1981)	13, 14
Martinez v. California, 444 U.S. 277 (1980)	9
McLeod v. McLeod, 338 A.2d 39 (Me. 1978)	7
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	9, 13
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)	7, 10
Societe Internationale v. Rogers, 357 U.S. 197 (1958)	9
United States v. Kras, 409 U.S. 434 (1973)	9, 10
Statutes	
New York CPLR Sec. 327	2, 5
28 U.S.C. Sec. 1254	2
Sec. 2101	2
Other Sources	
Restatement (Second) Conflict of Laws, Sec. 84 (1969)	7

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No. 88-

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD. (DOING BUSINESS IN NEW YORK AS NATCORP),
Petitioner,

v.

BANCO DE VIZCAYA, S.A.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner, National Bank and Trust Co. of North America, Ltd. (doing business in New York as NATCORP) (hereinafter, "National") respectfully asks this Court to issue a writ of certiorari. Review is necessary to prevent application of a decision of the highest court of the State of New York that is in conflict with decisions of this Court and that deprives National of its right to due process of law as guaranteed by the Fourteenth Amendment.

OPINIONS BELOW

The memorandum decision and opinion of the New York Court of Appeals is published at 72 N.Y.2d 1005 (1988), and is attached as Appendix A to this petition. The order of the New York Appellate Division, First Department, affirming the order of the New York Supreme Court for New York County, Special Term (here-

inafter, "Special Term") is published at 134 A.D.2d 971, 520 N.Y.S.2d 891 (1987) and is attached as Appendix B. The opinion of Special Term is as yet unpublished and is attached as Appendix C.

JURISDICTION

The order of the New York Court of Appeals was entered on October 13, 1988. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1), since this is an action in which the New York Court of Appeals has rendered a final judgment. This petition is filed within the 90 days allowed by 28 U.S.C. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves New York CPLR 327, and the Fourteenth Amendment to the United States Constitution. The provisions thereof are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner, National, is a corporation organized under the laws of the British West Indies, and qualified to do business in New York. *R.A.* at 238; 357-58.[1] National has no assets other than this action. *R.A.* at 142; 238.

Since at least 1980, National's sole office (other than a British West Indies statutory mailing address) has been the New York residence of Agustin Arrau, the owner of 98 percent of National's outstanding stock, and its president, sole officer and sole employee. *R.A.* at 238. Arrau has lived in New York continuously from 1975 to the present. *R.A.* at 1481-82.

Respondent, Banco de Vizcaya, S.A. (hereinafter, "BdV"), is an international banking corporation chartered in Spain, which conducts business as a bank in

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[1] References to the Record on Appeal before the New York Court of Appeals shall be designated "*R.A.*" and followed by the appropriate page number.

New York. BdV has assets in excess of $15 billion and maintains assets exceeding $700 million in the United States, with at least $100 million in assets in the State of New York. *R.A.* at 239; 1072-76.

The dispute between the parties stems from BdV's admittedly illegal diversion from New York and subsequent misapplication of $5.3 million, some $2 million of which BdV had irrevocably committed to pay to National. *R.A.* at 267-82.

In 1975, Nigeria entered into numerous contracts to purchase a total of 16 million tons of cement, agreeing to pay the suppliers "demurrage," i.e., payment for the time the delivery ships lay idle in harbor waiting to be unloaded. One of these contracts was between the Nigeria and J.L.M. International, Inc., a Massachusetts corporation (hereinafter, "J.L.M."). *R.A.* at 359. National, as J.L.M.'s agent, contracted in New York to purchase the cement and chartered six ships to transport it. *R.A.* at 254.

In the summer and fall of 1975, hundreds of ships carrying cement, including the six chartered by National, reached Lagos harbor, overwhelming the port facilities. *R.A.* at 259. Demurrage costs escalated, and on September 30, 1975, Nigeria revoked its cement purchase contracts. *R.A.* at 250. National made substantial demurrage payments (approximately $2 million) to the owners of two of the six ships. These two ships were eventually unloaded in the summer of 1976. *R.A.* at 261-62. At the same time, BdV had guaranteed, and made, demurrage payments to the owners of two other of these six ships, on behalf of another party. *R.A.* at 260-61.

On March 11, 1976, in a settlement agreement with J.L.M. executed in Nigeria, Nigeria agreed to pay accrued demurrage on all six ships and to make periodic payments for demurrage accruing thereafter. *R.A.* at 365-66. That agreement required Nigeria to deposit

$5.3 million in a New York city bank account of BdV's London branch upon Nigeria's receipt of the time sheets held by each ship's master. *Id.*

National controlled the time sheets for the two ships for which it had paid demurrage and advised BdV that it would not authorize their release without a written commitment that, upon Nigeria's payment to BdV in New York, BdV would in turn pay National for past demurrage and make periodic re-payments of National's on-going demurrage payments. *R.A.* at 267-68. On March 31, 1976, BdV provided National with such an irrevocable commitment, which National accepted two days later. *R.A.* at 421-23; 430-31. Relying thereon, National released the time sheets.

BdV, however, without National's knowledge or consent, subsequently reneged on its March 31 commitment to National and agreed with Nigeria to change the place of payment, and diverted the $5.3 million to a West German bank account of its London branch.[2] BdV then refused to reimburse National for any part of the demurrage that National had paid. *R.A.* at 270-76.

National filed criminal charges against BdV in Spain, alleging that BdV had misappropriated $2 million. The Spanish criminal courts dismissed the charges for lack of subject matter jurisdiction, ruling that the acts of BdV complained of had occurred outside of Spain and did not violate the criminal laws of Spain. *R.A.* at 204-05; 217-18.

By this time, National was without assets and could not institute an action against BdV in the Spanish civil

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[2] In July of 1976, BdV discovered that J.L.M. was trying to change the place of payment agreed upon in the March 11 Settlement Agreement. BdV sent a cable to the Central Bank of Nigeria informing Nigeria that "[s]uch a request is illegal and if admitted legitimate interests will be left unsatisfied." *R.A.* at 440. Some two weeks later, BdV consented to change the place of payment to West Germany. *R.A.* at 444-45.

courts due to the high cost of retaining counsel. *R.A.* at 1515. Contingent fees are prohibited in civil actions in Spain. *Id.* Attorneys in Spain have no discretion over the fees they charge in civil actions, but instead are required by law "to charge clients *and collect* minimum recommended fees" based upon the amount of money involved in the litigation. *Id.* (emphasis added). Because of the amount in controversy, the cost to National to retain an attorney and to institute an action in the Spanish civil courts, even to test their court's jurisdiction, would, according to the uncontroverted opinion of National's expert on Spanish law, amount to "well over $200,000," excluding the potential costs for interpreters and experts on United States law. *Id.*

In March of 1982, National, whose sole office has since at least 1980 been in New York, instituted the underlying civil action in the New York Supreme Court. National was able to institute that action *only* because it was able to obtain legal counsel on a contingent fee basis. *R.A.* at 322-23.

The complaint stated causes of action for fraud, an accounting, willful breach of fiduciary duty and breach of contract. National sought $2,180,000 in compensatory damages, punitive damages, and an accounting and recovery of all profits earned by BdV with the principal owed to National. *R.A.* at 13-36.

In September of 1982, BdV moved pursuant to CPLR Sec. 327 to dismiss the action on the ground of *forum non conveniens.* Special Term dismissed the action, subject to BdV's stipulation that it would appear and waive any statute of limitations defense in Spain, the proposed alternative forum, that had not expired prior to the institution of the New York action. *R.A.* at 11.

Special Term dismissed the action despite the uncontradicted evidence that National was an assetless shell, with no hope of being able to proceed in Spain due to the

prohibitive cost of instituting a civil action there. *R.A.* at 321-23; 1515. Yet, in the face of this evidence, Special Term stated that there was "no reason to conclude that the Spanish courts would not entertain this civil suit. . . ." *App. C* at 9a.

Special Term's dismissal was without prejudice subject to National's right to reinstitute the action in New York in the event that the Spanish courts "reject jurisdiction." *App. C* at 10a. This caveat underscores Special Term's failure to consider the practical unavailability of the "alternative" Spanish forum, since National had demonstrated that it was without the financial resources to even institute an action and determine if the Spanish courts would accept jurisdiction. Accordingly, Special Term's order left National without any forum, and effectively denied it the ability to prosecute its action anywhere.

The Appellate Division affirmed without opinion. *App. B* at 3a-4a. The New York Court of Appeals granted leave to appeal, and then in a brief memorandum opinion affirmed the order of the Appellate Division. *App. A* at 1a-2a.[3]

The Court of Appeals avoided addressing National's argument that Spain was not an available forum. It characterzed the availability of an alternative forum as merely another factor to be considered by Special Term. Having minimized the determination that an available alternative forum exist, by characterizing it as one of many factors whose weight is wholly dependent upon the trial court's discretion, the Court of Appeals effectively sanctioned dismissal even where dismissal

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[3] In its briefs before the appellate courts, Petitioner re-articulated this argument that dismissal of the case in New York would have the practical effect of denying National access to *any* judicial forum. *National's Brief Before the Appellate Division* at 54-57; *National's Brief Before the Court of Appeals* at 55-59.

would constitute the death knell of the litigation. Incredibly, the New York Court of Appeals began and ended its review by concluding that, because Special Term had *considered* the argument offered by National that dismissal on the grounds of *forum non conveniens* would be the death knell of the action, it had not abused its discretion. *App. A* at 2a.

REASONS FOR GRANTING THE PETITION

I. As a matter of law, and of due process of law, a court may not dismiss an action on the ground of *forum non conveniens* without first ascertaining that an alternative forum exists both as a legal and as a practical matter.

In both *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, Fn. 22 (1981), this Court wrote that any application of the doctrine of *forum non conveniens* presupposes the existence of an alternative forum. At least one federal court has suggested that this rule is "clearly grounded on due process considerations." *Farfanfarmaian v. Gulf Oil Corp.*, 437 F. Supp. 910, 915 (S.D.N.Y. 1977), *aff'd* 588 F.2d 880 (2d Cir. 1978).

This Court should grant the petition for writ of certiorari to establish that the availability of an alternative forum as a prerequisite to dismissal of an action on *forum non conveniens* grounds goes hand in hand with the concept of an "opportunity to be heard" that is a central tenet of due process. While the requirement of an available alternative forum has been generally adhered to by state and federal courts,[4] its failure to be understood

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[4] *See* Restatement (Second) Conflict of Laws, Sec. 84 (1969). "The majority of jurisdictions . . . are in accord with the Restatement view that an alternative forum is not merely *a factor* in analysis, but rather an *essential prerequisite* to application of *forum non conveniens*." *McLeod v. McLeod*, 338 A.2d 39, 43, Fn.3 (Me. 1978) (emphasis in original).

as a constitutional mandate has led to its misapplication as only a mere factor to be weighed.

In *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985), in determining whether as a matter of comity New York need make its courts available to a non-resident plaintiff suing a non-resident defendant over a dispute with no nexus to the state, the New York Court of Appeals held that the availability of an alternative forum is not a threshold requirement but is rather only a factor to be weighed in a *forum non conveniens* analysis. *Id.* at 481. There, the court ruled that this Court's statements that another forum be available as a necessary prerequisite to dismissal was "dicta" and that this Court "never suggested that the doctrine of *forum non conveniens* implicates constitutional due process rights." *Id.*

In the instant case, the New York Court of Appeals applied *Pahlavi* beyond its peculiar factual circumstances in determining that the availability of an alternative forum is merely a factor to be weighed in a *forum non conveniens* analysis in an action brought by a New York resident in a New York Court. In so doing, the court below failed to consider the due process implications of dismissal where the uncontested evidence was that the other forum was, as a practical matter, unavailable. As a result, Petitioner was deprived of its property (its causes of action) without due process of law.

To comport with due process considerations of fairness and justice, a forum must not just be theoretically available, it must also be within the grasp of the particular litigant before the court. If due process of law requires a hearing before a property right may be extinguished, then, in the context of *forum non conveniens*, due process of law also requires that before a case may be dismissed, a court must determine that an alternative forum exists and that the plaintiff will be able to obtain a hearing in

that forum. Otherwise, legitimate causes of action can be consigned to a purgatory in which no forum will provide the plaintiff with an opportunity to be heard.

The United States Constitution does not permit this. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, sec. 1. National's causes of action against BdV are a species of protected property. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Martinez v. California*, 444 U.S. 277, 281-82 (1980). "[I]t has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest." *Id.* at 433 (*quoting Board of Regents v. Roth*, 408 U.S. 564, 570-71, Fn. 8 (1972) (emphasis in original)); *see also Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51 (1909). Indeed, this Court has left no doubt that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and that a plaintiff's access to a court for resolution of his legal claim is deserving of due process protections to the same extent as is a defendant's. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

Thus, National's causes of action is a protected property interest and it follows that the due process clause prohibits a state court from dismissing them without insuring that there is an "opportunity to be heard."[5]

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[5] To be sure, certain limits and reasonable procedural requirements, such as statutes of limitations or reasonable filing fees, may be placed on a litigant's right to have its case determined on its merits. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314-16 (1945); *United States v. Kras*, 409 U.S. 434 (1973). A court may dismiss a case, without considering the merits of the underlying cause of action, if a party fails to comply with such procedural

In the instant case, the proposed alterantive forum does not offer an adequate opportunity because it imposes insurmountable financial hurdles before a party with no ability to pay the "entry fee." [6] It is different from *Gulf*, where the Court was "quite sure" that there was an "open door" somewhere. *Gulf, supra*, 330 U.S. at 507. It is different from *Piper*, where there were two "open doors," albeit where one offered a "process" less palatable to the plaintiff. *Piper, supra*, 454 U.S. at 247. In the instant case, there is only one open door, New York—the other is closed to all who cannot afford the substantial admission fee.

In *Piper*, the representative of the estates of several Scottish citizens killed in a plane crash in Scotland, was told to take the citizens' claims to the Scottish courts, where they would no doubt be heard, although not necessarily to the representative's satisfaction. *Id.* at 260-61. In the instant case, the courts below have told Petitioner, a New York resident, to take its claim elsewhere, without regard for the fact that *there is no elsewhere.*

Thus, review by this Court will prevent the perversion of the "balancing" process which this Court endorsed in

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or evidentiary rules. *Hammond Packing Co. v. Arkansas, supra,* 212 U.S. at 351.

But in the case of *forum non conveniens,* the court's analysis presupposes that the plaintiff has *complied* with all applicable jurisdictional and venue statutes, and a *forum non conveniens* dismissal is not premised on a plaintiff's failure to comply with procedural requirements. *Gulf Oil Corp. v. Gilbert, supra,* 330 U.S. at 507.

[6] The financial barrier facing National is far more substantial than the $50 filing fee upheld in *Kras.* The Court stressed the minimal burden placed on the plaintiff in *Kras,* equating his $1.28 per month (in 1973 dollars) required to proceed in bankruptcy court with the cost of a movie or two packs of cigarettes. *Kras, supra,* 409 U.S. at 449. National, on the other hand, has demonstrated that it will be forced to front approximately $200,000 in order to proceed in the Spanish civil system. *R.A.* at 321-23; 1515.

Gulf and *Piper* from a shield into a sword by which a defendant who makes a successful *forum non conveniens* motion can do much more than "vex," "harass," or "oppress" his opponent; he can literally send his opponent's case into oblivion. Review by this Court can prevent this, by demonstrating that the threshold requirement that there be, in a *real* sense, an alternative forum—before any such balance can be done—is a mandate of the Constitution.

The New York Court of Appeals, in affirming the dismissal of Petitioner's action without requiring a determination that an alternative forum is "available" to the plaintiff, has transformed the originally benign concept of *forum non conveniens* into a different, and dangerous, legal principle, one that fails to conform to traditional notions of due process of law. Review by this Court is necessary to demonstrate that the due process clause precludes the New York version of *forum non conveniens* as a procedure which may be invoked simply to crush the life out of viable causes of action, a protected property right, by shutting the doors of the only forum practically available to the plaintiff.

In the instant case, Special Term's finding that "there is no reason to conclude that the Spanish courts would not entertain this civil suit and that the ultimate relief sought—damages arising from the contract repudiation—are not available in Spain" (*App. C* at 9a), is little more than a finding that the Spanish civil justice system exists and, *in theory*, was available to the plaintiff. But theory and reality are often polar opposites. Thus by reviewing this case, the Court can provide the state and lower federal courts with a definitive description of what constitutes an "available" alternative forum in the context of a *forum non conveniens* determination.

In the instant case, the courts of Spain are simply unavailable to Petitioner in either a practical or a theoretical sense. Petitioner demonstrated to Special Term

that a Spanish forum was not available in any theoretical sense. The Spanish criminal courts had determined that they had no jurisdiction of the dispute, and that the acts complained of occurred outside of Spain, and did not violate Spanish criminal law. *R.A.* at 204-05; 217-18. And National demonstration to Special Term that Spanish civil law does not allow for the recovery of profits improperly earned as a result of a breach of fiduciary duty was undisputed by BdV. *R.A.* at 188-89; 193-94; 1510-15; 1519-21. Thus, Spanish courts could not even in theory provide relief for this claim.

But, in addition to the theoretical unavailability of the Spanish court, National cannot, as a practical matter, gain access thereto. In this case, National has demonstrated that it is unable to institute, no less prosecute, a civil action in Spain. National, to simply obtain its "day in court"—even to contest the court's subject matter jurisdiction—would have to advance $200,000 that it does not have. *R.A.* at 1515. For National, this "entry fee" represents more than expensive justice, it represents an insurmountable bar to justice.

The courts below failed even to address this reality. Instead, the Court of Appeals affirmed the lower court's decision on the incredible basis that because Special Term had "considered" the argument that National was asset-less then it could not be deemed to have abused its discretion in dismissing the case. The Court of Appeals found no "abuse of discretion," despite the inevitable conclusion that dismissal in New York Supreme Court sounded the death knell of the litigation and prevented National from retrieving its stolen property through ANY court system. But the question is more than whether there was an abuse of discretion. Review by this Court is essential to demonstrate that the right to a hearing before a property right can be eliminated is a matter of constitutional right, not a question of appropriate weight in a balancing process.

This Court should grant the petition and inject a strong dose of reality into the runaway doctrine of *forum non conveniens*. When evaluating claims that certain procedures violate due process, this Court has taken the proper approach and has looked to the practical realities of each case. Thus, in *Mullane v. Central Hanover*, *supra*, 339 U.S. at 315, in addressing the analogous issue of what notice satisfies due process, this Court rejected the argument that notice that *in theory* could reach the defendant (i.e. notice by publication) was comparable to actual notice, such as a letter to the defendant's last known address, that *in practice* was reasonably expected to reach the defendant. Thus, "when notice is a person's due, process which is a mere gesture is not due process." *Id.*

Likewise, when an opportunity for a hearing is a person's due, the "availability" of a forum whose use is, practically, unavailable to the plaintiff is also a "mere gesture" that is not, and cannot be, due process. Just as notice must be "reasonably calculated" to reach the defedant to an action, so too must the opportunity to be heard in some court, somewhere in the world, be "reasonably calculated" to lead to a determination of the case on its merits. Any time that a court dismisses an action without first determining that there is an alternative forum available to a particular plaintiff, both in theory *and in practice*, that court is betraying concepts of fairness and justice inherent in the due process clause.

Several federal courts have grasped what the New York courts have not—the importance of an inquiry into the *practical availability* of an alternative forum. For example, the United States Court of Appeals for the Second Circuit in *Manu Int'l S.A. v. Avon Products, Inc.*, 641 F.2d 62 (2d Cir. 1981) reversed the district court's dismissal for *forum non conveniens*. The lower court's action would have required the plaintiff to litigate in Taiwan. One element of the court's reasoning was that

"the supposedly more convenient forum is in reality no forum at all." *Id.* at 67. The court noted that is would be "almost a perversion of the *forum non conveniens* doctrine" to send the plaintiff to a jurisdiction that did not offer realistic hope of providing a forum. *Id.* In *Irish Nat'l Ins. Co., Ltd. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir. 1984), another panel of the United States Court of Appeals for the Second Circuit described any *forum non conveniens* analysis undertaken without a threshold inquiry into the *practical availability* of the alternative forum to be "Kafkaesque" and "somewhat of a legal charade." *Id.* at 91.

Petitioner does not argue that the lack of a contingent legal fee system in Spain should constitute a *per se* bar to dismissal on the ground of *forum non conveniens.* This would ignore the fact that many plaintiffs can well afford to litigate overseas. But, on the undisputed facts of this case, there is no doubt that the financial barriers raised by Spain to civil litigation constitute an impentetrable barrier to National's ability to even institute an action, much less to obtain a hearing in that forum. The Fourteenth Amendment required Special Term to determine National's practical ability to gain access to the Spanish forum. The due process clause requires that the availability of an alternative forum be affirmatively established as a matter of law and not merely treated as another "factor" in a complex balancing test left entirely to the discretion of the trial court.

CONCLUSION

This Court should issue a writ of certiorari and review the decision of the New York Court of Appeals. The Court should make clear that a *forum non conveniens* dismissal of an action despite a showing that the Petitioner cannot afford the proposed alternative forum deprives Petitioner of its "opportunity to be heard" and violates its right to due process of law as guaranteed by the Fourteenth Amendment.

Respectfully submitted,

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January 11, 1989

APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 233

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD. &C.,
Appellant,

v.

BANCO DE VIZCAYA, S.A.,
Respondent.

Michael J. Hutter, Albany, & David H. Fromm & Jerrold T. Doros, NY City, for appellant.

Eliot Lauer, NY City, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327). The doctrine is flexible, requiring the balancing of many factors in light of the facts and circumstances of the particular case (*Banco Ambrosiano, S.p.A. v Artoc Bank & Trust*, 62 NY2d 65, 73; *Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361). This task is committed to the sound discretion of the courts below and, unless they have excluded consideration of relevant circumstances, there has been no abuse of

discretion reviewable by this Court (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479; *Varkonyi v Varig*, 22 NY2d 333, 337-38).

On this record, the failure of Special Term to explicitly address the issue in its written decision does not establish that the courts below refused to consider the factors relating to the availability of an alternative forum. Nor does it appear that the lower courts neglected any of the other considerations proffered by plaintiff or otherwise committed legal error.

Accordingly, there is no basis for us to disturb their decision to dismiss the action.

Order affirmed, with costs, in a memorandum. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided October 13, 1988

APPENDIX B

ORDER OF APPELLATE DIVISION DATED NOVEMBER 19, 1987 AFFIRMING ORDER OF SPECIAL TERM

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 19, 1987

Present—Hon. Francis T. Murphy, Presiding Justice
Leonard H. Sandler
Sidney H. Asch
E. Leo Milonas
Ernst H. Rosenberger, Justices.

31255

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.
(doing business in New York as NATCORP.),
Plaintiff-Appellant,

-against-

BANCO DE VIZCAYA, S.A.,
Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Harold Baer Jr., J.), entered on September 19, 1986, and said appeal having been argued

by Mr. Jerrold T. Doros, David H. Fromm and Frederick A. Polatsek of counsel for the appellant, and by Mr. Eliot Lauer and Benard v. Preziosi, Jr. of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondent shall recover of appellant $75 costs and disbursements of this appeal.

ENTER:

/s/ [Illegible]
Clerk

APPENDIX C

SUPREME COURT
NEW YORK COUNTY SPECIAL TERM
PART I

Index No. 7092/82

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.,
Plaintiff,

-against-

BANCO DE VIZCAYA, S.A.,
Defendant.

[Filed Sept. 17, 1986]

HAROLD BAER, JR.:

Defendant, Banco De Viscaya, S.A. ("BdV") renews its motion pursuant to CPLR 327 to dismiss this action on the ground of *forum non conveniens.* Briefly, this case arises out of an agreement to supply cement entered into in 1975 between the Republic of Nigeria with J.L.M. International, Inc. ("JLM"), a Massachusetts corporation. JLM subsequently, through plaintiff National Bank and Trust Co. of North America, Ltd. ("National"), contracted with Interexporte, S.A.R.L. ("Interexporte"), a Portuguese company, pursuant to which Interexporte agreed to furnish and ship the cement to Nigeria.

In May, 1975, Interexporte contracted with two Spanish corporations, Fletamentos Macia, S.A. and its affiliate, Juan Macia, S.A. (collectively, "Macia"), pursuant to which Macia would furnish the necessary vessels to transport the cement from Portugal to Nigeria.

BdV, on behalf of Macia, issued guarantees of the demurrage payable to two Greek-flag vessels which had been chartered by Macia and National to transport cement to Nigeria. Several other vessels were chartered, but BdV was not requested to issue guarantees covering those vessels. The vessels, loaded with cement, arrived in Lagos Harbor between July and October, 1975, and due to delays in unloading the vessels, were forced to anchor in the harbor and incur demurrage. BdV made demurrage payments under its guarantee covering the two Greek-flag vessels and National made payments for at least two others—the Agelos Gabriel and the Salvia.

In March, 1976, a settlement was reached in Nigeria between Nigeria and JLM whereby Nigeria undertook subject to the presentation of satisfactory documents to pay all the accrued demurrage through March 10, 1976, and JLM agreed to cancel the balance of the contract for cement. Demurrage payments were to be made to the account of BdV London, at the Mellon International Bank in New York City with reference to JLM.

Since National had paid the demurrage on the Agelos Gabriel and Salvia, the necessary documents in order to obtain reimbursement were held by National, who refused to authorize their release until National's bank, BIC, received from Macia's bank, BdV, a written commitment that upon Nigeria's payment of the demurrage to BdV, BdV would pay to National 87.5% of all demurrage paid by National to the owners of the Agelos Gabriel and Salvia through March 10, 1976, ($1.04 million). Accordingly, on March 31, 1976, a letter (the "Letter") was sent to BIC in Madrid from BdV in Madrid which provided that BdV agreed to pay over monies received from Nigeria in return for National's seeing to it that before April 9, 1976, the shipowners filed the necessary documents with Macia to obtain payment of demurrage from Nigeria.

National urges that the Letter was intended to cover past as well as any future demurrage payments and that it notified its shipowners immediately to transfer the appropriate documentation to Macia for presentation to Nigeria. On April 2, 1976, National alleges that by letter sent from Kingstown, St. Vincent, West Indies, (National's place of incorporation), the terms were acknowledged. By letter dated May 14, 1976, Macia, writing from Madrid to BdV also in Madrid, advised BdV that since BIC had not accepted the March 31 offer, BdV was instructed to cancel the deal set out in the Letter.

On August 30, 1976, and again on September 21, 1976, Morgan Guaranty, Nigeria's bank in New York City, received instructions from Nigeria's Central Bank to make a total payment of approximately $5.3 million to Deutsche Bank in Frankfurt for the account of BdV in favor of JLM for demurrage claims. Nigeria, JLM and BdV had earlier agreed to change the bank to which the payment was to be made from Mellon in New York to the German bank. BdV distributed the proceeds to a variety of concerns, but nothing was paid to National.

National, in October, 1979, commenced criminal proceedings against BdV in Spain but was twice thwarted, once because the Spanish court, without elaboration, concluded that criminal conduct, if any, arising out of these transactions occurred in London. Thereafter, a criminal court—with jurisdiction over acts outside Spain—decided that the matter was civil, not criminal and dismissed the criminal proceeding in that court in 1981.

National commenced the instant action in May, 1982, for fraud, breach of contract, breach of "quasi-fiduciary" duty and for an accounting of profits earned by BdV with funds that National claims were improperly withheld from them.

BdV's initial motion pursuant to CPLR 327 was, in effect, held in abeyance pending discovery into the ap-

propriateness of a motion to dismiss on the ground of *forum non conveniens*. That discovery has now been completed and the issue is ripe for consideration.

CPLR 327 allows a court to stay or dismiss an action where it is determined that the action, although jurisdictionally proper, would be better adjudicated elsewhere. *Islamic Republic v. Pahlavi*, 62 NY2d 474, 478 NYS2d 597 (1984). The burden rests, the Court of Appeals said in *Pahlavi*, "upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation . . . and the court, after considering and balancing the various factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not." 62 NY2d at 479.

Among the factors to be considered are the potential hardship to the defendant, the unavailability of an alternative forum in which plaintiff may bring suit, the burden on the New York courts and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling.

In the instant case, the transaction out of which the causes of action arose occurred outside New York. The March 31, 1976 Letter was sent from Spain to BIC's Madrid offices. The April 2, 1976, "acknowledgment" by National originated in St. Vincent. The alleged repudiation of the agreement occurred, if at all, in Madrid when Macia wrote from its offices there to those of BdV in Madrid, cancelling the agreement. Even assuming arguendo that National was to be paid in New York—a fact for which there is no support other than that payment by the terms of the letter was to be made to National in US dollars—the center of gravity for these transactions was Spain and a New York court would be obligated to apply Spanish law which would govern those claims based on acts and representations which took place

in Spain and involved transactions between the Spanish offices of two banks. *See Babcock v. Jackson*, 12 NY2d 473, 240 NYS2d 743 (1963). While not an insurmountable burden for the court, deciphering the applicable Spanish law has hardly been an easy task for these litigants.

Turning to the hardship on the defendant, both parties have made it clear that wherever the trial is held some witnesses and parties will be inconvenienced. Non-party witnesses—BIC, Macia and officials of the Nigerian Government—are located outside New York and, significantly, BdV asserts that if the action was tried in Spain it would join Macia because the bank was acting solely on his instructions. There is no proof that Macia could be impled into the instant action.

While commencing the action in New York serves the convenience of National because its majority shareholder resides in New York, generally a plaintiff must be able to show more than its own convenience for selecting a forum where the choice imposes a heavy burden on the court and the defendant. *Pahlavi, supra* at 482. Moreover, courts have dismissed cases where the plaintiff is a New York Corporation or, like National, is qualified to do business here, where the underlying facts have no nexus with this state. *Meritum Corp. v. Lawyers Title Ins. Corp.*, 88 AD2d 828, 451 NYS2d 134 (1st Dept.) *aff'd, Adriana Dev. Corp. v. Gasper*, 81 AD2d 235, 439 NYS2d 927 (1st Dept. 1981). Concommitantly, the BdV branch office in New York, while maintaining sufficient contacts here to sustain jurisdiction, played no role in the transactions out of which the instant action arose.

Finally, as to the availability of an alternative forum in which plaintiff may sue, there is no reason to conclude that the Spanish courts would not entertain this civil suit and that the ultimate relief sought—damages arising from the contract repudiation—are not obtainable in Spain.

Should the Spanish courts reject civil jurisdiction over this matter, the parties may apply to the New York court for appropriate relief. *See Adriana Dev. Corp. v. Gaspar supra.*

Therefore, the motion to dismiss the action on the ground of *forum non conveniens* (CPLR 327) is granted on condition that within 60 days from the date of this order, defendant shall serve and file a stipulation agreeing that if within one year after the date hereof plaintiff institutes an action in the Spanish courts for a determination of the claims asserted in the instant action, the defendant will appear and submit to the jurisdiction of the Spanish courts in that action and shall stipulate to waive any statute of limitations defense in that action to the extent that the applicable statute of limitations had not yet expired prior to the institution of the instant action. In the event such stipulation is not so furnished, the motion to dismiss shall be denied, provided further that such dismissal shall be without prejudice to the prompt reinstitution of the action in New York in the event that the Spanish courts reject jurisdiction.

This constitutes the decision and order of the court.

Dated: September 12, 1986

/s/ J.S.C.
J.S.C.

APPENDIX D

STATUTES INVOLVED

New York Civil Practice Law and Rules
Rule 327. Inconvenient forum

(a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Constitution of the United States
Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.,

Petitioner,

—v.—

BANCO DE VIZCAYA, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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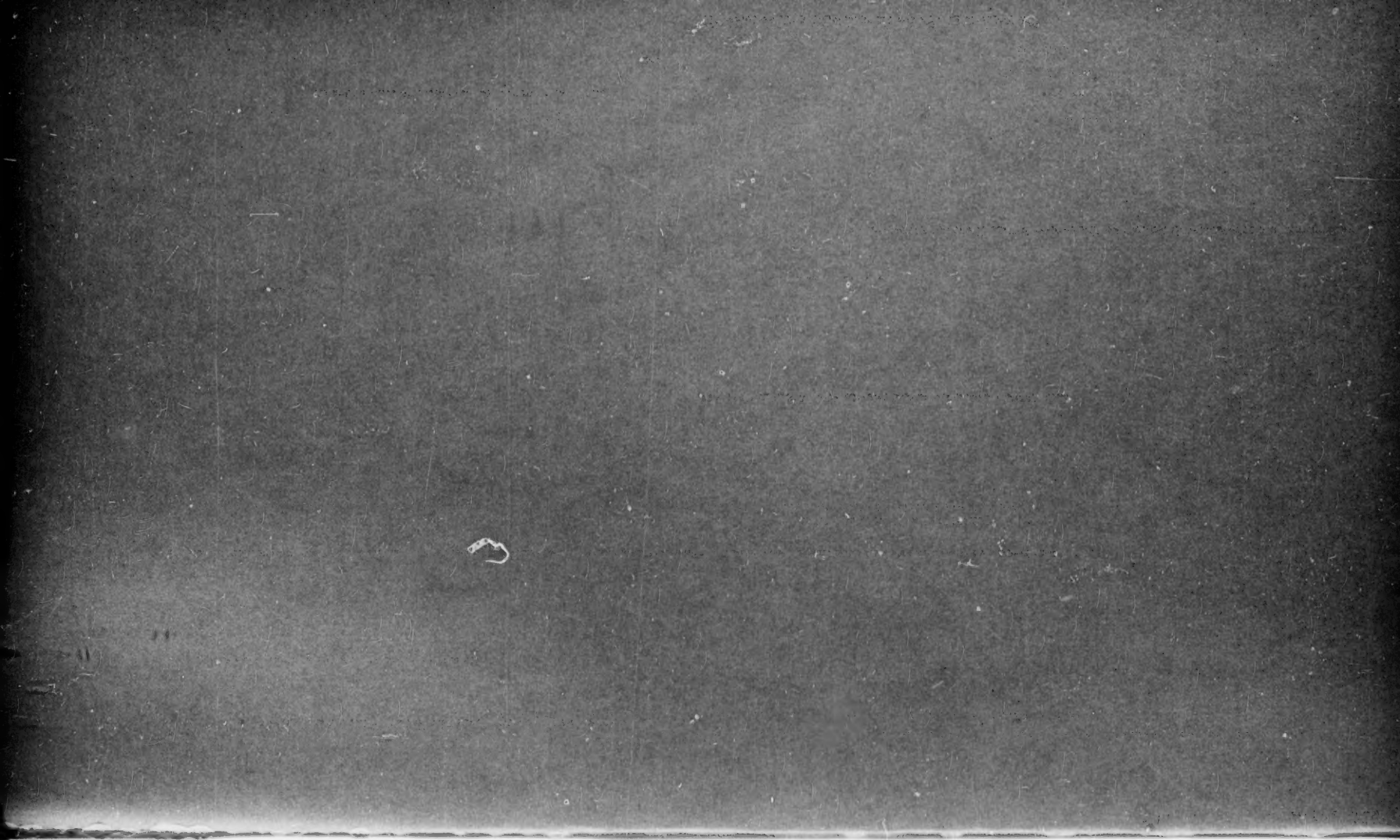
February 10, 1989



QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review a federal constitutional issue which was not raised, preserved, or passed upon in the state courts?

2. Whether the fourteenth amendment due process clause guarantees to a foreign corporation an absolute right to litigate the merits of its foreign civil claims in a United States court if the foreign corporation asserts that it is incapable of funding litigation in the foreign court in accordance with the laws of that forum?

LIST OF PARTIES

As of September 1, 1988, Respondent Banco de Vizcaya, S.A. merged with Banco Bilbao, S.A., to form Banco Bilbao-Vizcaya, S.A., a banking corporation organized and existing under the laws of Spain. Banco Bilbao-Vizcaya, S.A. has no parent company. A list of the subsidiaries and affiliates of Banco Bilbao-Vizcaya, S.A. is included as the Appendix hereto.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement of the Case	2
Reasons for Denying the Petition	4
I. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THIS CASE BECAUSE NATIONAL FAILED TO RAISE ITS CONSTITUTIONAL CLAIM IN THE STATE COURTS	4
II. THE DUE PROCESS CLAUSE DOES NOT GUARANTEE TO A FOREIGN CORPORATION A HEARING ON THE MERITS OF ITS CIVIL CLAIMS WHEN A STATE COURT HAS DETERMINED THAT A MORE CONVENIENT ALTERNATIVE FORUM EXISTS	7
1. National Has Not Been Deprived Of Its Causes Of Action	7
2. Due Process Does Not Mean That Every Civil Litigant Is Entitled To A Hearing On The Merits Of Every Civil Claim	9

PAGE

a. In Cases Involving Private Commercial Relationships, The State May Allocate Access To Its Courts In Any Non-Arbitrary Manner 9

b. The New York *Forum Non Conveniens* Rule Is Rationally Justified 10

c. The Due Process Clause Does Not Require That Foreign Litigants Be Given Greater Access To United States Courts Than They Would Have To Their Own Courts 12

Conclusion 14

TABLE OF AUTHORITIES

Cases	PAGE
Abouchalache v. Hilton Int'l Co., 464 F. Supp. 94 (S.D.N.Y. 1978), *aff'd sub. nom. Collins v. Hilton Int'l Co.*, 628 F.2d 1344 (2d Cir. 1980)	8
Agyenkwa v. American Motors Corp., 622 F. Supp. 242 (E.D.N.Y. 1985)	8
Boddie v. Connecticut, 401 U.S. 371 (1971)	9, 10
Broida v. Bancroft, 103 A.D.2d 88, 478 N.Y.S.2d 333 (2d Dep't 1984)	4
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5, 13
Cibro Petroleum Products, Inc. v. Chu, 67 N.Y.2d 806, 501 N.Y.S.2d 321, 492 N.E.2d 394 (1986)	6
Exxon v. Eagerton, 462 U.S. 176 (1983)	5
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	11, 12
Hill v. California, 401 U.S. 797 (1971)	5
Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied*, 469 U.S. 1108 (1985)	6, 7, 11
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	9
Martin v. Mieth, 35 N.Y.2d 414, 362 N.Y.S.2d 853, 321 N.E.2d 777 (1974)	11
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	5
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)	8, 11, 13
Silver v. Great American Ins. Co., 29 N.Y.2d 356, 328 N.Y.S.2d 398, 278 N.E.2d 619 (1972)	10, 11

PAGE

Street v. New York, 394 U.S. 576 (1969) 5

United States v. Kras, 409 U.S. 434 (1973) 9, 10, 11

Webb v. Webb, 451 U.S. 493 (1981).....4, 5, 6

Constitution, Statutes and Rule

U.S. Const. amend. XIV, § 1.....*passim*

28 U.S.C. § 1257(3).....2, 4, 5

N.Y. Civ. Prac. L. & R. § 327 (McKinney 1989 Supp.) 2, 6, 10, 11

Sup. Ct. R. 21.1(h) 2, 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1143

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.,

Petitioner,

—v.—

BANCO DE VIZCAYA, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum decision and opinion of the New York Court of Appeals, 72 N.Y.2d 1005, 534 N.Y.S.2d 913, ____ N.E.2d ____ (1988), is reprinted as Appendix A to the petition for a writ of certiorari of National Bank and Trust Co. of North America, Ltd. ("National"). The order of the New York Appellate Division, First Department, 134 A.D.2d 971, 520 N.Y.S.2d 891 (1st Dep't 1987), affirming the decision and order of the New York Supreme Court, New York County, Special Term ("Special Term"), is reprinted as Appendix B to National's petition. The unpublished decision and order of Special Term is reprinted as Appendix C to National's petition.

JURISDICTION

The order of the New York Court of Appeals was entered on October 13, 1988. National incorrectly states that the jurisdiction of this Court rests upon 28 U.S.C. § 1254(1), which governs appeals and writs of certiorari from the federal circuit courts of appeals. (National Pet. at 2)[1] If this Court has jurisdiction in this matter, it rests upon 28 U.S.C. § 1257(3), because this is an action in which the highest court of New York State has rendered a final judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

National's petition involves the due process clause of the fourteenth amendment to the United States Constitution, 28 U.S.C. § 1257(3), Supreme Court Rule 21.1(h), and Section 327 of the New York Civil Practice Law and Rules ("CPLR 327").

STATEMENT OF THE CASE

Petitioner National is a foreign banking corporation organized and existing under the laws of Saint Vincent, British West Indies. It is undisputed that in 1976, when the alleged events upon which National bases its causes of action occurred, National's sole office (other than a British West Indies mailing address) was in Madrid, Spain. National did not qualify to do business in New York until 1984, more than two years after respondent, Banco de Vizcaya, S.A. ("BdV"), initially filed its motion to dismiss on the ground of *forum non conveniens.* (R.A. at 12, 13, 1459-60)[2]

Respondent BdV is a foreign banking corporation organized and existing under the laws of Spain with its principal offices in

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1 References in the form "(National Pet. at _____)" are to pages of National's "Petition for a Writ of Certiorari to the New York Court of Appeals," filed on January 11, 1989.

2 References in the form "(R.A. at _____)" are to pages of the Record on Appeal before the New York Court of Appeals.

Bilbao, Spain. Although BdV maintains a branch office in New York, it is undisputed that neither that office nor any present or former employee of that office, had any connection with any of the transactions mentioned in National's complaint. (National's Appendix C at 9a; R.A. at 43)

National's causes of action are premised upon an alleged agreement made in Madrid, Spain, between BdV, which was acting on behalf of its Spanish clients, Fletementos Macia, S.A. and Juan Macia, S.A., and National's Spanish bank, Banco Internacional de Comercio. That agreement is purportedly evidenced by a March 31, 1976 letter. National claims that in reliance upon this agreement, it relinquished control over certain demurrage documents that were later presented to the Nigerian government and resulted in a transfer of funds from Nigeria to BdV in accordance with a settlement agreement that governed one of Nigeria's cement purchase contracts. National further claims that BdV distributed the funds it received from Nigeria, but breached the March 31, 1976 letter agreement by failing to transfer any of the funds to National. (National's Appendix C at 8a-9a; R.A. at 25-27, 421-25)

National initiated criminal proceedings in the Spanish courts in 1979, alleging that BdV's wrongful conduct occurred in Madrid. (R.A. at 94, 100) The Spanish courts dismissed National's criminal complaints because the claims were civil in nature, and relegated National to the Spanish civil courts. (R.A. at 217-19). National did not pursue its civil remedies in Spain, but commenced this action in the New York State courts in May 1982. (National's Appendix C at 7a)

In September 1982, BdV moved to dismiss National's complaint on the ground of *forum non conveniens*. After National obtained discovery relevant to the *forum non conveniens* factors, BdV refiled its motion to dismiss on August 6, 1985. On September 12, 1986, Special Term issued a decision and order dismissing National's claims. (National's Appendix C) After full briefing and argument, the New York Appellate Division, First Department—whose scope of review of a *forum non conv-*

eniens determination is coextensive with that of Special Term (*see Broida v. Bancroft*, 103 A.D.2d 88, 93, 478 N.Y.S.2d 333, 337 (2d Dep't 1984))—issued an order dated November 19, 1987 that unanimously affirmed Special Term's dismissal. (National's Appendix B) The New York Court of Appeals granted National's motion for leave to appeal and, after full briefing and argument, issued a memorandum decision dated October 13, 1988 that unanimously affirmed the dismissal. (National's Appendix A)

In 388 pages of briefs to the New York courts, National never once raised the question it now asks this Court to "review"—namely that in dismissing this action on the ground of *forum non conveniens* without "insuring" that National could afford counsel in Spain, the New York courts deprived National of its property in violation of the fourteenth amendment due process clause. National's petition for a writ of certiorari should be denied because this Court is without jurisdiction to review this previously unraised question. Moreover, certiorari should be denied because National has not been deprived of any property, and New York's *forum non conveniens* rule was applied in this case in accordance with this Court's opinions and is rationally justified.

REASONS FOR DENYING THE PETITION

I

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THIS CASE BECAUSE NATIONAL FAILED TO RAISE ITS CONSTITUTIONAL CLAIM IN THE STATE COURTS

The jurisdiction of this Court to review decisions of state courts by writ of certiorari is circumscribed by 28 U.S.C. § 1257(3). This Court has interpreted this statute as requiring that "in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which [it] now seeks to have this Court enforce." *Webb v. Webb*, 451 U.S. 493, 495 (1981). Moreover, this Court has repeatedly held that it is without jurisdiction to review a

constitutional question that was not "raised, preserved or passed upon in the state courts." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *accord Webb v. Webb*, *supra*, 451 U.S. at 498-99; *Hill v. California*, 401 U.S. 797, 805 (1971); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

In addition to the statutory requirements of 28 U.S.C. § 1257(3), this Court has also enumerated prudential considerations militating against review of constitutional issues raised for the first time in this Court. First, the state court should be given the initial opportunity to consider the constitutional challenge. Second, absent such consideration, the record is very likely to be inadequate because it was not compiled with the constitutional issue in mind. *Cardinale v. Louisiana*, *supra*, 394 U.S. at 439; *see Webb v. Webb*, *supra*, 451 U.S. at 499-501; *McGoldrick v. Compagnie General Transatlantique*, *supra*, 309 U.S. at 434-35.

The decision of the New York Court of Appeals affirming the dismissal of National's complaint on the ground of *forum non conveniens* does not mention or pass upon National's belated due process claim. (*See* National's Appendix A) Nor do the decisions of the lower New York courts. (*See* National's Appendices B and C) In such circumstances, this Court has repeatedly held that "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); *accord Exxon Co. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Rule 21.1(h) of this Court also requires the petitioner to "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of

certiorari." *See Webb v. Webb*, *supra*, 451 U.S. at 495. National has not satisfied this requirement and has not demonstrated—nor can it—that it timely and properly raised its claimed due process challenge in the New York state courts.

Even if National had raised its due process claim in the New York Court of Appeals, that court would have been without jurisdiction to review it because National had never argued that claim in the lower state courts. *Cibro Petroleum Products, Inc. v. Chu*, 67 N.Y.2d 806, 809, 501 N.Y.S.2d 321, 322-23, 492 N.E.2d 394, 395-96 (1986). National's failure to preserve its claimed constitutional issue in the lower state courts for review by the New York Court of Appeals provides "an independent state procedural ground barring [this Court's] consideration of the federal issue." *Webb v. Webb*, *supra*, 451 U.S. at 498 n.4.

National's briefs to the New York courts consist of 388 pages.[3] Not once in those voluminous submissions did National assert that there was any constitutional issue applicable to the court's *forum non conveniens* inquiry. Not once did National urge that dismissal would deprive it of a property right in violation of the fourteenth amendment due process clause. Not once did National claim that the long-recognized New York doctrine of *forum non conveniens*—now codified in CPLR 327—had any constitutional dimension whatsoever.[4] This Court is without jurisdiction to review this case.

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3 Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, dated September 24, 1985 (80 pages); Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss, dated November 22, 1985 (20 pages); National's Brief Before the Appellate Division (undated) (69 pages); National's Reply Brief Before the Appellate Division (undated) (29 pages); National's Motion, Affirmation, Brief and Exhibits in Support of Motion for Leave to Appeal to the Court of Appeals, dated January 4, 1988 (65 pages); National's Brief Before the Court of Appeals, dated July 21, 1988 (82 pages); National's Reply Brief Before the Court of Appeals, dated August 29, 1988 (43 pages).

4 Indeed, although National now focuses critically upon the New York Court of Appeal's decision in *Islamic Republic of Iran v. Pahlavi*, 62

II

THE DUE PROCESS CLAUSE DOES NOT GUARANTEE TO A FOREIGN CORPORATION A HEARING ON THE MERITS OF ITS CIVIL CLAIMS WHEN A STATE COURT HAS DETERMINED THAT A MORE CONVENIENT ALTERNATIVE FORUM EXISTS

National argues in essence that because its alleged causes of action against BdV are a "species of protected property" (National Pet. at 9), the New York courts were required, as a matter of due process, to "insure" that those causes of action will be heard on the merits. National's argument must fail because: (1) National has not been deprived of its causes of action; and (2) due process does not mean that every civil litigant is entitled to a hearing on the merits of every civil claim.

1. National Has Not Been Deprived Of Its Causes Of Action

National claims that because it "demonstrated" to the state courts that it is unable to afford counsel to institute a civil action in Spain, the dismissal of this action in favor of the

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N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied*, 469 U.S. 1108 (1985), in asserting that the New York courts "failed to consider the due process implications of dismissal" by failing to give the availability of an alternative forum constitutional status (National Pet. at 8), National did not, in the state court, ever contest the statement in *Pahlavi* that "the Supreme Court, while ruling with respect to procedural rights in the Federal courts, has never suggested that the doctrine of *forum non conveniens* implicates constitutional due process rights." 62 N.Y.2d at 483, 478 N.Y.S.2d at 602, 467 N.E.2d at 250. Indeed, in its briefs before both the New York Appellate Division and the New York Court of Appeals, National did not argue that the availability of an alternative forum is a constitutionally mandated prerequisite to dismissal; instead, National relied upon *Pahlavi* for the proposition that "while no single factor is determinative, a pertinent and 'most important' factor is the availability of another suitable forum." National's Brief Before the Appellate Division at 44; *see also* National's Brief Before the Court of Appeals at 53. The very issue National now raises for the first time was specifically mentioned in *Pahlavi*, a case upon which National itself relied in delineating the New York rule on *forum non conveniens*.

Spanish forum has deprived it of its causes of action. This claim is premised upon the false assertion that National's alleged corporate impecuniousness means that National does not have access to funds to litigate in Spain. But there is no evidence to support this assertion. In fact, with the exception of the unsupported statement of its 98% shareholder, Augustin Arrau, National produced no evidence of its financial condition. Moreover, National produced *no* evidence at all relating to its ability to obtain funds to sue in Spain. National did not, for example, produce its financial statements or the financial statements of any of its affiliates, including INTRAFINSA, another Spanish-based company owned by Arrau. (R.A. at 367, 383) Nor did National produce any of Arrau's financial statements, which are particularly relevant in light of the fact that he would be the 98% beneficiary of any recovery against BdV. Indeed, in its petition, National has tempered its claim of poverty by describing itself as "an assetless shell" (National Pet. at 5) while neglecting to mention BdV's demonstration to the state courts that National's 98% shareholder, Arrau, owns an eight acre estate in a wealthy suburb of New York City. (*See* BdV's Brief Before the Court of Appeals at 49-50; R.A. at 1505-07) The New York courts were not required to accept National's bald statements that it cannot obtain funds to pursue its claims in Spain. *See Agyenkwa v. American Motors Corp.*, 622 F. Supp. 242, 245 (E.D.N.Y. 1985); *see also Abouchalache v. Hilton Int'l Co.*, 464 F. Supp. 94, 98 (S.D.N.Y. 1978), *aff'd sub. nom. Collins v. Hilton Int'l Co.*, 628 F.2d 1344 (2d Cir. 1980). Thus, on this record, National has not been deprived of its property right; instead, National has been relegated to the civil courts of Spain to litigate its causes of action in accordance with the laws of the place where it did business with BdV.[5]

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5 National also argues that not all of its claims are cognizable under Spanish law. (National Pet. at 12) This Court has made it clear that the mere fact that a foreign court does not provide all of the substantive and procedural rights that might be available in a United States court is an insufficient basis to defeat a *forum non conveniens* motion. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250-52 (1981).

2. Due Process Does Not Mean That Every Civil Litigant Is Entitled To A Hearing On The Merits Of Every Civil Claim

a. In Cases Involving Private Commercial Relationships, The State May Allocate Access To Its Courts In Any Non-Arbitrary Manner

Access to the courts is mandated by due process only when it is essential to the adjustment of fundamental human relationships; in circumstances involving private commercial relationships, the state may allocate access to its courts in any non-arbitrary manner. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *United States v. Kras*, 409 U.S. 434 (1973); *see also* R. Rotunda, J. Nowak & J. Young, 2 *Treatise on Constitutional Law: Substance and Procedure* § 17.10, at 307 (1986). Contrary to National's contention, this Court has specifically held that "nothing we have said entitles every civil litigant to a hearing on the merits in every case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

Boddie v. Connecticut, *supra*, 401 U.S. 371, involved a constitutional challenge to a filing fee that prevented indigents from access to the courts to dissolve their marriages. This Court concluded that when the state makes the judicial process the exclusive means for adjusting a fundamental relationship such as marriage, which "involves interests of basic importance in our society," *id.* at 376, the state cannot, consistent with due process, deny access to persons who cannot afford the filing fee. *Id.* at 382-383. Importantly, this Court noted that, even in cases involving fundamental rights, the interests of the state in limiting court access must be considered and balanced against the underlying right, and "a sufficient countervailing justification for the State's action" can preclude court access. *Id.* at 380-81; *see also Logan v. Zimmerman Brush Co.*, *supra*, 455 U.S. at 430 n.5. Although this Court rejected the proposed state interest in the filing fee requirement in the context of divorce proceedings in *Boddie*, this Court carefully noted that "[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits." 401 U.S. at 378.

In *United States v. Kras*, *supra*, 409 U.S. 434, this Court was faced with a constitutional challenge to a filing fee required to obtain access to the courts for a protective discharge under the bankruptcy laws. This Court limited *Boddie* to its circumstances by holding that a judicial discharge in bankruptcy—unlike divorce—is an adjustment of a "private commercial relationship," in which the state has little interest, and that Kras, like other parties to business transactions, was not bound by state mandate to adjust his commercial affairs by judicial process. 409 U.S. at 445. Accordingly, Kras' "interest in the elimination of his debt burden," which would "effect no change with respect to basic necessities," was outweighed, *inter alia*, by "[t]he rational basis for the fee requirement." *Id.* at 445, 447.

In this case, as in *Kras*, National is merely suing to recover damages allegedly sustained in connection with a private commercial relationship. National's causes of action do not involve fundamental rights, and, in light of New York's rational interest, through flexible application of the *forum non conveniens* doctrine, in limiting access to its courts for the adjudication of imported litigation, National's due process assertion must fail.

b. The New York *Forum Non Conveniens* Rule Is Rationally Justified

The New York *forum non conveniens* rule was codified in CPLR 327 in 1972, following the New York Court of Appeals decision in *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 328 N.Y.S.2d 398, 278 N.E.2d 619 (1972). There, as a result of the recently enacted New York long-arm statute, the court held that "greater flexibility in applying the doctrine is not only wise but, perhaps, necessary." 29 N.Y.2d at 361, 328 N.Y.S.2d at 403, 278 N.E.2d at 622. CPLR 327 states, in relevant part:

> (a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party

> to the action shall not preclude the court from staying or dismissing the action.

This legislative enactment, like the filing fee requirement in *Kras*, is a justifiable limitation on court access. It permits the New York courts "to decline to exercise jurisdiction over a transitory cause of action upon considerations of justice, fairness and convenience." *Martin v. Mieth*, 35 N.Y.2d 414, 417, 362 N.Y.S.2d 853, 856, 321 N.E.2d 777, 779 (1974). As with its federal counterpart, *see Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the New York *forum non conveniens* rule requires "the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation . . . and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not." *Islamic Republic of Iran v. Pahlavi*, *supra*, 62 N.Y.2d at 479, 478 N.Y.S.2d at 600, 467 N.E.2d at 248 (1984).

This Court has recognized that no one private or public interest factor is controlling in a *forum non conveniens* inquiry because "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 249-50. The New York courts have similarly recognized this premise. *Islamic Republic of Iran v. Pahlavi*, *supra*, 62 N.Y.2d at 479, 478 N.Y.S.2d at 600, 467 N.E.2d at 248; *Silver v. Great American Ins. Co.*, *supra*, 29 N.Y.2d at 361, 328 N.Y.S.2d at 403, 278 N.E.2d at 622. This Court and the New York courts likewise agree that once the lower court has considered the relevant factors, its decision will stand absent an abuse of discretion. *Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 255; *Islamic Republic of Iran v. Pahlavi*, *supra*, 62 N.Y.2d at 479, 478 N.Y.S.2d at 600, 467 N.E.2d at 248.

National relies upon this Court's decision in *Gulf Oil Corp. v. Gilbert*, *supra*, 330 U.S. 501, for the assertion that one of the *forum non conveniens* factors—the availability of an alterna-

tive forum—is of constitutional significance. (National Pet. at 10) However, neither in that nor in any other decision has this Court held that, as a matter of constitutional due process, a court must find that a plaintiff has the financial ability to satisfy the procedural and substantive requirements attendant to access to the alternative forum. In *Gulf Oil Corp.*, this Court only stated that the alternative forum requirement, in federal cases, "presupposes at least two forums in which the defendant is *amenable to process*; the doctrine furnishes criteria for choices between them." 330 U.S. at 507 (emphasis supplied). It is the defendant's amenability to process, and not plaintiff's peculiar circumstances, that satisfies this federal requirement.

In sum, the New York statute and decisional law—as applied in this case—is in complete accord with this Court's decisions. New York's *forum non conveniens* rule is a rationally justified response to the threat of inundation with foreign based litigation. New York is entitled to refrain from exercising its jurisdiction to preserve the integrity of its system and to ease the burden on its already overcrowded court system. Having balanced the competing *forum non conveniens* factors and having found that Spain is an available and more convenient forum for the adjudication of this action, the New York courts have done all that is required. Due process requires nothing more.

c. The Due Process Clause Does Not Require That Foreign Litigants Be Given Greater Access To United States Courts Than They Would Have To Their Own Courts

If accepted by this Court, National's novel reformulation of the *forum non conveniens* inquiry that adds a constitutional due process dimension to a single factor—the alternative forum factor—would undermine the flexibility of the doctrine and substantially burden the court systems of this country. In essence, under National's reformulation, every foreign plaintiff would be constitutionally entitled to sue and have its case heard on the merits in a United States court as long as the plaintiff can serve process on the defendant and show that the laws of the appropriate jurisdiction deny judicial access. Thus, by simply retaining New York contingency fee counsel to serve process on

a Spanish neighbor who happens to be in New York, an impecunious Spanish plaintiff would be entitled to a full trial on the merits of his claim in the New York courts even if: the underlying claim has no nexus with the state; all of the witnesses, documents and other sources of evidence are located in Spain; other interested parties are not amenable to process in New York; and foreign law would apply. Under National's reformulation, even a wealthy foreign litigant could obtain an absolute right to a New York forum by establishing an assetless shell and assigning a cause of action to the shell, which then initiates an action in New York. *Cf. Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 251 n.17.[6]

Similarly, the due process clause should not be interpreted to provide foreign litigants with greater access to the United States courts than they would have to their own courts. Thus, an impecunious Spanish plaintiff with a dispute based in Spain against a United States corporation doing business in Spain should not be entitled to a United States forum when, under Spanish law, he would be precluded from access to the Spanish courts. Under National's reformulation, this result would be constitutionally mandated. As a result of such broad-sweeping constitutional protection, "[t]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive." *Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 252.[7]

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6 National's reformulation would also require a defendant claiming inconvenience to engage in protracted discovery in the challenge forum to oppose plaintiff's claim of impecuniousness, thereby defeating one of the primary goals of the doctrine itself.

7 By failing to raise its constitutional challenge below, National deprived the New York courts of an opportunity to explain in this case the rational justifications for New York's *forum non conveniens* rule. This is one of the very reasons this Court early on established the rule that it "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, *supra*, 394 U.S. at 438.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
February 10, 1989

Respectfully submitted,

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NANCY E. DELANEY

APPENDIX

APPENDIX

Aceites y Proteinas
Acquapark
Adelphia Industrias, S.A.
Administradora de Patrimonios, S.A.
Administradora de Servicios, S.A.
Advent Espana
Advent Uno
Adyal Hotels
Agesa, S.A.
Agria Argentina, S.A.
Agria Comercial, S.A.
Agria Hispania, S.A.
Agria Portugal, Maquinas Agricolas Limitada
Agria, S.A. de Capital Variable (Mexico)
Agricola Del Segura, S.A.
Agrupacion Industrial Aragonesa
Agrupacion Temporal Empresas, S.A.
Aguas de Barcelona, S.A.
Agua y Seulo, S.A.
Ahorro Intercontinental
Air Espana
Air Espana, S.A.
Aitena
Ajuria Comercial, S.A.
Ajuria, S.A.
Alavesas de productos Quimicos
Aldiana Fuerteventura, S.A.
Algorta
Alimentos Congelados, S.A.
Almazan, S.A.
Aloha Golf, S.A.
Ancla Investments S.A.
Andaluza de Bebidas Carbonicas, S.A.
Antracitas de Banuelas, S.A.
Aparcamientos de Barcelona, S.A.
Aplicaciones Tecnologicas Laser
Arcem, S.A.

Areitio Distribuciones, S.A.
Areitio, S.A.
Arrobi, S.A.
Artesanos del Pato, S.A.
Aryho, S.A.
Asgard Estates, Ltd.
Asitur
Astra, Unceta y Cia
Astur-Centro, S.A.
Aurada
Aurora Polar, S.A. de Seguros
Aurrera
Autopista Vasco-Aragonesa
Autopista Vasco-Aragonesa, S.A.
Auxiliar de Distribucion, S.A.
Aviles de la Camara, S.A.
Ayamonte
B.B. Factoring, S.A.
B.B. Finance (Delaware) Inc.
BBG, Gestora de Inversiones Bancobao, S.A.
B.B.K. Advisors, S.A.
B.B. Trade, S.A.
Banca Catalana
Banca Mas Sarda, S.A.
Banca Mora, S.A.
Bancaya Inmobiliaria
Bancaya Hipotecaria
Banc Internacional, S.A.
Banco Arabe Espanol, S.A.
Banco Atlantico Costa de Marfil
Bancoco, Inc.
Banco Comercial de Mayaguez
Banco Condal, S.A.
Banco de Barcelona, S.A.
Banco de Bilbao—Deutschland, A.G.
Banco de Bilbao (Gibraltar) Ltd.
Banco de Bilbao Nominees, Ltd.
Banco de Bilbao—Panama, S.A.
Banco de Bilbao—Suisse, S.A.

Banco de Credito Canario, S.A.
Banco de Credito y Ahorra, S.A.
Banco de Extremadura, S.A.
Banco de Huelva
Banco de Huelva, S.A.
Banco de Huesca, S.A.
Banco del Comercio, S.A.
Banco del Oeste, S.A.
Banco de Promocion de Negocios, S.A.
Banco Industrial de Bilbao, S.A.
Banco Industrial de Cataluna, S.A.
Banco Industrial del Mediterraneo, S.A.
Banco Industrial del Sur
Banco Meridional, S.A.
Banco Occidental
Baninbao de Inversiones, S.A.
Barbier, S.A.
Barcelona, Agencia de Seguros
Bay of Biscay Services, Ltd.
Bayquisa
Bermeo
Bibj Management Ltd.
Bibj Nominess Limited
Bilbaina de Firmes Especiales
Bilbao Hambros Asset Management
Bilbao International Bank (Jersey), Ltd.
Bilboa International Finance Limited
Bilbao International Limited
Bilboa International N.V. Holanda
Bilbao Merchant Bank, S.A.
Bilbao Wines, S.A.
Biotecnica, S.A.
Bisol Investments Limited
Bodegas Campo Viejo, S.A.
Bodegas Levantinas, S.A.
Bodegas y Bebedas USA Inc.
Bodegas y Bebidas Co. Ltd.
Bodegas y Bebidas Scotland
Bodinver

Bonfil, S.A.
Boroa I, S.A.
Boroa II, S.A.
Boroa III, S.A.
Boroa IV, S.A.
Boroa V, S.A.
Boroa VI, S.A.
Boroa VII, S.A.
Boroa VIII, S.A.
Boroa IX, S.A.
Boroa X, S.A.
Boroa XI, S.A.
Boroa XII, S.A.
Boroa XIII, S.A.
Boroa XIV, S.A.
Boroa XV, S.A.
Boroa XVI, S.A.
Boroa XVII, S.A.
Boroa XVIII, S.A.
Boroa XIX, S.A.
Boroa XX, S.A.
Boroa XXI, S.A.
Boroa XXII, S.A.
Boroa XXIII, S.A.
Boroa XXIV, S.A.
Boroa XXV, S.A.
Brilen, S.A.
Bulkcarriers Reunidos, S.A.
Cafetal, S.A.
Caja de Emisiones, S.A.
Campo Ebro Industrial, S.A.
Canal International Holding (Netherlands) BV.
Canal International Holding, S.A.
Canal Trust Company, Ltd.
Cantabria II
Cantabria II, S.A.
Cartera de Inversiones Bancobao, S.A.
Casa de la Filarmonica, S.A.
Castellana Cial. de Inversiones

Catalana de Cobros y Factoring, S.A.
Catalana de Estudios Economicos
Catoc Investments, S.A.
Cedeban
Celacove, C.N., S.A.
Celulosa y Papel de Galicia
Central de Informatica, S.A.
Centro Aviles, S.A.
Certaex, S.A.
Cevisa
Chalco, S.A.
Chocolates Loyola, S.A.
Cia. Anonima Alava Mercantil, S.A.
Cia. de Cartera e Inversiones, S.A.
Cia. de Hipermercados Aragoneses, S.A.
Cia. Espanola Minas Tharsis, S.A.
Cia. Espanola Seguros, La Prevision Nacional
Cia. Iberica de Encuadernaciones, S.A.
Cia. Industrial Asua-Erandio, S.A.
Ciervana
Cincor, S.A.
Clima, S.A.
Clinica Vicente San Sebastian, S.A.
Cobre Electrolitico y Metales, S.A.
Codimex, S.A.
Cofiges
Cogebel
Comercial Balav, S.A.
Comercial Decorativa, S.A.
Comercial Minera
Comercial Tecnicas Reunidas, S.A.
Compania Europea de Seguros, S.A.
Compania Minera de Rio Piron, S.A.
Compras Nacional Y Internacionales
Concentrados de Uva, S.A.
Confecciones Alemany, S.A.
Confecciones Fatima, S.A.
Congelados Castilla, S.A.
Congelados Ebro, S.A.

Consejo Inmobiliario, S.A.
Conserva Isabel Ecuatoriana, S.A.
Conservas Jaravilla, S.A.
Construcciones Botiguero, S.A.
Construcciones Gonzalez Barros, S.A.
Construcciones Martin Samaniego, S.A.
Construcciones Metalicas Mares, S.A.
Constructora Casan, S.A.
Constructora Inmob. Urb. Vasco-Aragonesa, S.A.
Consultores de Pensiones Bancobao, S.A.
Contratas Canarias, S.A.
Cooperacion Tecnica Bancaria
Corporac. Ind. Pais Valenciano, S.A.
Corporacion Bancaria, S.A.
Corporacion de Recobros, S.A.
Corporacion de Servicios Financieros Bancobao, S.A.
Corporacion Financiera de Bilbao, S.A.
Corporacion Financiera Reunida-Cofir
Corporacion General Aseguradora, S.A.
Corporacion General Financiera, S.A.
Corporacion Hipotecaria Bancobao, S.A.
Corporacion Industrial Bancoboa, S.A.
Corporacion Industrial Internacional, S.A.
Corporacion Industrial y de Servicios, S.A.
Corporacion Inmobiliaria Bancobao, S.A.
Corporacion Internacional, S.A.
Creaciones Inmobiliarias, S.A.
Creaciones Michael, S.A.
Crestel
Cruzadillo, S.A.
Cultivos Maritimos de Orinon, S.A.
Dallant, S.A.
David Coutts Co. Ltd.
Decoracion, S.A.
Delicass Comercial de Guipuzcoa, S.A.
Delicass Comercial, S.A.
Delicass Sociedad de Alimentacion, S.A.
Depositos del Norte, S.A.
Depositos Subterraneos, S.A.

Derivados Agrios Valencianos, S.A.
Derivados del Hilado, S.A.
Desarrollo Inmobil. Comercial
Deusto
Diagonal Carlos III
Diffset, Ltd.
Digasa
Digasa, S.A.
Disliner, S.A.
Distribuciones Begona, S.A.
Ditribuidora Comercial Alavesa, S.A.
Distribuidora del Norte, S.A.
Distribuidora Internacional de Alimentac, S.A.
Domar
Dynamic Management Services, Ltd.
Eblan, S.A.
Echene, S.A.
Ediciones Albia, S.A.
Edificaciones las Fonts, S.A.
Edificio Nervion, S.A.
Ediman, S.A.
Ediprasa
Editores Asociados para la Television Independiente, S.A.
Eeuren Comercial, S.A.
Elanchove
Embotelladora Echevarri Vina, S.A.
Emicosa, S.A.
Empresa Marketing Informatico, S.A.
Empresas Quimicas, Sociedad de S.A.
Enciclopedia Latino-Americana, S.A.
Equipos Industriales Saguinsa
Eria
Espanola de Fund. Electricas
Espanola de Investigacion y Dessarrollo, S.A.
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Espanola de Servicios, Ltda.
Espanola de Sismica, S.A.
Espanola Medios de Pago
Espanola Seg. Cto. Exportacion

Espasa Calpe Argentina
Espasa Calpe Colombiana
Espasa Calpe Equatoriana
Espasa Calpe Mejicana, S.A.
Espasa Calpe, S.A.
Espasa Comunicacion, S.A.
Espasa-Credito, S.A.
Estacionamientos Bilbainos, S.A.
Estacionamientos Guipuzcoanos, S.A.
Estampados Orient, S.A.
Estudio Tecnico de Inversiones, S.A.
Estudios Energeticos Petrogas, S.A.
Estudios Energeticos y Petrogas
Estudios M.N.P., S.A.
Euba, S.A.
Eurocard Espana, S.A.
Eurocard Espana Sociedad Civil
Eurocontrol, S.A.
Euroseguros, S.A.
Explotaciones de Minas y Terrenos
Explotaciones Varias, S.A.
Explotadora e Inversora Baldasano, S.A.
Explotadora Minas Y Terreras, S.A.
Exportadora Vinicola Valenciana, S.A.
Fabrilmalla Inc. Puerto Rico
Fabrilmalla, S.A.
Farcomex, S.A.
Ferrocarriles Vascongados, S.A.
Fibras Plasticas, S.A.
Figranvisa
Filbo, S.A.
Filon Sur, S.A.
Financiera Bancobao, S.A.
Financiera Espanola, S.A.
Financiera Nortena, S.A.
Finsa
Fomento de Inversiones Internacionales, S.A.
Fomento de la Coruna, S.A.
Fomento Industrial del Puerto Aviles, S.A.

Fomento Quimico Espanol, S.A.
Fominver Iberica, S.A.
Fondo Regulacion Mercado Hipotecario, S.A.
Fondo SCR 300
Fondo SCR-300
Foresta
Forjados y Prensados, S.A.
Formigal, S.A.
Fresneda Deportiva, S.A.
Frigorifica Compania, S.A.
Frigorifica de Transform, Comercio, CIA. S.A.
Frigorificos de Bermeo, S.A.
Frigorificos del Noroeste, S.A.
Frio Alimentario, CIA. Del, S.A.
Frutas de Badajoz
Gamatec, S.A.
Garantia Reaseguros, S.A.
Gavial, Correduria de Seguros, S.A.
Gefidocks
General del Azafran de Espana
General Hortifruticola, S.A.
General Promotora, S.A.
General Quimica, S.A.
Gesbancaya
Gesbanque
Gescatalana 2
Gescatalana, S.A.
Gescaya
Gestinova, S.A.
Gestion, Contratac. y Prom. Inmob.
Gestion Industrial Bancobao, S.A. de
Gestora Condal de Valores Mobiliarios, S.A.
G.H. Industrial
Gran Hotel Carlton
Granitos y Piedras de Canarias, S.A.
Grasas y Glicerinas, S.A.
Graver Espanola, S.A.
Grupos Diferenciales
Grupos Diferenciales, S.A.

Hambros P.L.C. (Public Limited Company)
Heimbach Iberica, S.A.
Helados y Congelados, S.A.
Hijos de Valenciaga
Hilaturas Llaudet, S.A.
Hofesa (France)
Holdgrup, S.A.
Home Fittings Espana, S.A.
Hotel Belvedere Salou
Hotel Tenerife Plaza
Iberese
Iberica de Envases, S.A.
Iberica de Sondeos, S.A.
Iberica Racionaliz. Energetica, S.A.
Ibertrade Commercial Corporation
Ibertrade, Ltd.
Iciar Urbanizadora, S.A.
Icosa Madrid, S.A.
Idemedia Service, S.A.
Inacosa, S.A.
Incotex, S.A.
Induban
Indumetal Recycling, S.A.
Industrial Ceramica y Obras, S.A.
Industrial Quimica de Asua, S.A.
Industrias Bilbainas del Embalaje, S.A.
Industrias Canarias de Nutricion Animal, S.A.
Industrias Catalanas de Nutricion Animal, S.A.
Industrias Extremenas de Nutricion Animal, S.A.
Industrias Feculeras, S.A.
Industrias Levantinas de Nutricion Animal, S.A.
Industrias Madrilenas de Nutricion Animal, S.A.
Industrias Reunidas Minero-Metalurgicas, S.A.
Industrias Sevillanas de Nutricion Animal, S.A.
Industrias Vallisoletanas Nutricion Animal, S.A.
Informacion Audiovisual, S.A.
Informatica y Organizacion, S.A.
Infraestructuras Aragonesas, S.A.
Infraestructuras Bilbainas, S.A.

Infraestructuras Montanesas, S.A.
Infrestructuras Aragonesas
Ingenieria de Servicios Urbanos
Ingenieria de Sistemas Asistenciales, S.A.
Iniciativas Agrarias de Canarias, S.A.
Inmobiliaria Areeta, S.A.
Inmobiliaria Bernardo, S.A.
Inmobiliaria Bilbaina Anonima, S.A.
Inmobiliaria Bilbao, S.A.
Inmobiliaria Centromar, S.A.
Inmobiliaria Coso, S.A.
Inmobiliaria Electra
Inmobiliaria Erota, S.A.
Inmobiliaria Estrella Polar
Inmobiliaria Galdacano
Inmobiliaria Goicotorre, S.A.
Inmobiliaria Guadaira, S.A.
Inmobiliaria Habana
Inmobiliaria Indopaz
Inmobiliaria Jumtex, S.A.
Inmobiliaria Metropolitana
Inmobiliaria Navarra, S.A.
Inmobiliaria Paopa, S.A.
Inmobiliaria Promesa, S.A.
Inmobiliaria Residencial Los Arroyos, S.A.
Inmobiliaria Residencial Muntaner, S.A.
Inmobiliaria Tyrene, S.A.
Inmobiliaria Sestao
Inmobialiaria Valdepielagos, S.A.
Inmobiliaria Vasco-Levantina
Inmobiliaria Valladolid, S.A.
Inmob. Vasco Central
Inmuebles en Renta Bancaya 1
Inmuebles en Renta Bancaya 2
Inpesca Fishing Ltd.
Instalad. Riegos Aspersion y Mecanizacion, S.A.
Instit. Vasco de Estudio e Investigac.
Instituto Vasco de Estudios e Investig., S.A.
Insula, S.A.

Interbao—Fondo de Inversion Mobiliaria
Interdeuda
Interfauna Iberica
Interfelt, S.A.
Interfinanzas, S.A.
Intermediacion Activos S.A.
Intermediacion de Activos, S.A.
Intermediarios Monetarios, S.A.
Intermedio, S.A.
Intermedios y Colorantes, S.A.
Internacional de Commodities
Internacional de Pesca y Derivados, Cia, S.A.
Internat. Kas (Liechtenstein)
Inversiones del Ocio, Sdad. General
Inversiones Katzen, S.A.
Inversiones Mobiliarias, S.A.
Inversiones y Promociones Gasteiz, S.A.
Inversion y Promocion
Invers. Mobil. Plus Ultra, S.A. (Gesca)
Invers. Mob. Plus Ultra II (Inveraho.)
Investigacion Alementaria, S.A.
Investigacion Quimica Industrial S.A.
Isofoton
Jabugo, S.A.
Jamsa
Janbide
Janbide, S.A.
Jimmis Corporacion, S.A.
Jimmis Europe, S.A.
Jimmis, S.A.
Jimmiss USA Inc. EEUU
Juan Fabregas, S.A.
Jumberca GMBH
Jumberca Italiana
Jumberca, S.A.
Jusarome, S.A.
KAS Benelux
KAS International
Kas, S.A.

Knorr Elorza, S.A.
Koksa, S.A.
Kopinver, S.A.
Kurkasino
Laboratorio Serona
Laboratorios Y Industrias Iven, S.A.
Laljad Realty Corp.
La Quinta Club de Golf, S.A.
La Union Resinera Espanola, S.A.
Layar Castilla, S.A.
Layar Norte, S.A.
Layar Real Reserva, S.A.
Layar, S.A.
Leasing Bancaya, S.A. (Liscaya)
Leasing Inmobiliario, S.A.
Libros Espanoles, S.A.
Lisban, S.A. Cia. de Leasing
Logitel
Lorenco, S.A.
Luse, S.A.
Mallorquina de Bebidas Carbonicas, S.A.
Mantenimiento Servicios Publicos
Mantenimiento Servicios Publicos, S.A.
Manufacturas, Ciclope, S.A.
Maquinas y Aux Oficina
Media Planing, S.A.
Mediterranea de Bebidas Carbonicas, S.A.
Mercados y Edificios Publicos, S.A.
Mercantil Y Industrial "Aurora", S.A.
Meremi
Metales Hispania, S.A.
M. Gil Galan, S.A.
Micromotor, S.A.
Miluce, S.A.
Minas de Herrerias
Minerales no Ferricos, S.A.
Mistral Wines Shippers Ltd.
Mobe
Mobiliaria Mat

Mogan, S.A.
Montajes del Farquet, S.A.
Montcada de Inversiones, S.A.
Montecastro, S.A.
Muebles Xey
Multival
Munchaner, Serv. Tecn. y Com.
Mundiahorro—Fondo Inver. en Valores Extranjeros
Munuzuri, Ripolin-Georget, S.A.
Mutua Nacional de Accidentes 'Perpetuo Socorro
Naviera Celta, S.A.
Naviera de Canarias, S.A.
Naviera del Golfo de Vizcaya, S.A.
Naviera Galdar, S.A.
Naviera Quimica, S.A.
Naviera Vizcaina
Naviera Vizcaina, S.A.
Neparsa
Netoval
Nikos, S.A.
Nueva Zona Aduanera de Irun
Nuevos Edificios
Occidente, S.A.
Occival
Olimar, S.A.
Ofimatica Leasing, S.A.
Operaciones Inv. Conjuntas
Ordino Anstalt
Organizacion y Personal, S.A.
Orgesa Holding N.V.
Panticosa Turistica, S.A.
Parque de las Merindades
Part. Servired, Sdad, Civil
Patrimonial Mediterranea, S.A.
Pesqueras de Toledo, S.A.
Pesqueria Vasco-Montanesa, S.A.
Petroleos del Norte, S.A.
Petronor
Pevaeche, S.A.

Pevensey, Inc.
Plans Gimeno, S.A.
Plasticos Celulosicos, S.A.
Plus Ultra, S.A.
Plus Ultra, Vida y Pensiones
Poble Espanyol de Monjuit, S.A.
Poligono Industrial de Gerona, S.A.
Polingesa
Pony Express Espanola, S.A.
Port D'Aiguadolc-Sitjes, S.A.
Port de Aiguadolc
Pozo Parlamento, S.A.
Pozo Portuguez, S.A.
Prevencion y Control S.A.
Primitivo Collantes, S.A.
Productora Fruticola Meneu, Sl y Cia
Productos del Rocio Almonte Marismas
Prokursa
Prom. Apartamentos Henao, S.A.
Promocion de Negocios Mobil. Y Inmob., S.A.
Promociones Belaviz
Promociones Cistel, S.A.
Promociones Inmob. Bancaya
Prom. Inmob. Espronceda
Promociones Inmobiliarias Arjona
Promociones Miguel Angel I
Promociones Miguel Angel II
Promociones Stein S.A.
Promoc. Viv. Sociales Huelva
Promola, S.A.
Promotora Bedarona
Promotora de Alimentacion, S.A.
Promotora de Recursos Agrarios, S.A.
Promotora de Recursos Alimentarios, S.A.
Promotora de Recursos Maritimos, S.A.
Promotora de Recursos Naturales S.A.
Promotora de Suelo Edificable, S.A.
Promotora Inmobiliaria Elorrieta, S.A.
Promotora Inmobiliaria Gordoniz, S.A.

Promotora Inmobiliaria Montornes, S.A.
Promotora Valle de Tena, S.A.
Promotora Viviendas Sociedades de Huelva, S.A.
Proni
Propgate, S.A.
Protecciones Elect. Alta Precision, S.A.
Protecsa, S.A.
Proves
Proves, S.A.
Proyectos Internacionales, S.A.
Prubi, S.A.
Puente Nolaya, S.A.
Quiminor
Quiminor, S.A.
Radiaciones y Microondas
Rentequipo, S.A.
Residencial El Abra
Rigau MKO
Rontealde, S.A.
S.A. Alavesa Productos Quimicos Bayquisa
Saccone Speed Iberia, S.A.
S.A. de Alimentacion
S.A. de Bebidas Carbonicas
S.A. de Estudios Economicos
S.A. de Intercambio y Credito
S.A.E. Almacenes Grales. Deposito
Salibre
Sanpere, S.A.
San Telmo Iberica Minera, S.A.
Saprin, S.A.
S.A. Publisal
Sass Transports S.A.
Saudesbank
Savin, S.A.
Sdad. Agricola de Transf. N.5616 'Los Prados'
Sdad. Bancaya Prom. Empresarial
Sdad. Espanola de Medios de Pago, S.A.
Sdad. Europea de Arrend., S.A.
Sdad. Ventas a Ctr. Bancaya, S.A.

Sequisa
Servicios Exteriores a Empresas, S.A.
Servicios Logisticos Espanoles, S.A.
Siberex
S.I.C. Condal
Silos de Toledo, S.A.
Silquimica
Sistemas Navales Friogenicos
Situbsa
Sociedad Agrupadora de Vagones Especiales, S.A.
Sociedad de Promocion e Inversion, S.A.
Sociedad de Tasacion, S.A.
Sociedad Espanola Financiacion Innovacion, S.A.
Sociedad Espanola Productos Quimicos, S.A.
Sociedad Industrial Asturiana Santa Barbara, S.A.
Societat General Inversiones
Softec
Sogeparsa
Sogescaya, S.A.
Solrac, S.A.
Sondeos Petroliferos, S.A.
Sonpetrol Internacional, Panama
Spanish Wines and Foods Center
Spectra IBI
Stein Baltogar, S.A.
Stein et Roubaix Espanola, S.A.
Stim Consulting, S.A.
Suertes Nuevas, S.A.
Sulfurico Del Norte, S.A.
Suministros Ganaderos
Symco Iberica, S.A.
Tagrisa
Talde Promociones y Desarrollo
Tecnicas Reunidas do Brasil
Tecnicas Reunidas Ecologia, S.A.
Tecnicas Reunidas Internacionales, S.A.
Tecnicas Reunidas Metalurgicas, S.A.
Tecnicas Reunidas, S.A.
Tecnicas Siderurgicas, S.A.

Tecnicas y Estudios Inmobiliaros, S.A.
Tecnica y Obras
Tecnisesuros, S.A.
Tecnologica, S.A.
Telares Circulares, S.A.
Telecomunicacion y Control
Telefonica Hispano Americana
Teleinformatica, S.A.
Telesilla Benasque Cerler, S.A.
Teltronic
Tenaia
Ten-Bel Fuerteventura, S.A.
Terminal de Graneles Bilbao
Terminal de Graneles de Bilbao, S.A.
Terminales Quimicos, S.A.
Termotecnica, S.A.
Textil Mon, S.A.
The Tharsis Company
Tina Menor
Tintes y Acabados de Navarra
Trainsa, S.A.
Transacciones de Valvuleria, S.L.
Transegur, S.A.
Transportes Blindados, S.A.
Tranvias y Electricidad, S.A.
Troitas Gallegas, S.A.
Troqueles y Calibres, S.A.
Tubesca
Tubos Forjados, S.A.
UCSA
Ultimos Desarrollos, S.A.
Union Bancaria Hispano-Marroqui
Union de Lavanderias Industriales, S.A.
Union Iberica Agraria, S.A.
Urbanizaciones Vallromanas, S.A.
Urbanizadora Aguadulce
Urbanizadora Baleares, S.A.
Urbanizadora Melia, S.A.
Urbanizadora Metropolitana

Urbanizadora Muskaria
Urbanizadora Muskaria S.A.
Urbanizadora San Llorens
Urbanizadora Tinerfena, S.A.
Urdiales, S.A.
Valdevivar
Valkisur
Valls I Promociones Inmobiliarias
Valna
Valna, S.A.
Valores Bancaya
Valores Credito Comercial
Valores Meridional
Verduras Congeladas, S.A.
Vidrieras de Alava, S.A.
Vinedos El Ingles, S.A.
Vinedos Rioja Alavesa, S.A.
Vinicola del Amparo, S.A.
Vinicola Navarra, S.A.
Visa Espana
Visa Espana, S.A.
Visa Espana S.C.
Viuda Esclusa e Hijos, S.A.
Viviendas Municipales, S.C.
Vizcaina de Inversores Mobiliarios, S.A.
Vizcaya Finanz
Vizcaya International
Westinghouse, Proyectos Electricos, S.A.
Wilkhahn, S.A.
Zeus Industrial
Zoos Ibericos, S.A.
Zumos de Navarra, S.A.